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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/555,040

11/21/2005

Susanne Emig

05-549-CIP

2756

34704 7590 06/22/2011

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SUITE 1201

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EXAMINER

HELM, CARALYNNE E

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

06/22/2011

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/555,040	Applicant(s) EMIG ET AL.
	Examiner CARALYNNE HELM	Art Unit 1615

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 19 May 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 21 April 2011. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: 44-50,58-66,76,78-86 and 88-91.
- Claim(s) withdrawn from consideration: 51-57,67-75,77,87 and 92.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement(s)*. (PTO/SB/08) Paper No(s). _____
13. ☒ Other: See Continuation Sheet.

/Caralynne Helm/ Examiner, Art Unit 1615	/Robert A. Wax/ Supervisory Patent Examiner, Art Unit 1615
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Continuation of 11. does NOT place the application in condition for allowance because: Applicants argue that the amendment reduces the number of issues on appeal. The scope of the claims is altered by the amendment such that new limitations are required in the claims that depend from claim 44. This is not deemed to materially reduce or simplify the issues for appeal. This newest amendment also adds the requirement that the compositions are "suitable in the area of decorative cosmetics" and this was not a limitation that was previously required. As a result, the new limitations require additional consideration and a new search.

In addition, applicants suggest some confusion on the part of the examiner concerning the argument that was presented in the previous reply. This is not the case. While applicants continue to argue that Krzysik et al. do not teach a cosmetic preparation, applicants include compositions that care and improve skin in the set classified as cosmetics. Krzysik et al. teach a composition envisioned for delivery/application from a cosmetic cleaning or buffing pad (see column 1 lines 18-22). Since such compositions would care and improve the skin, they qualify as cosmetic preparations according to applicants' application. As a result, Krzysik et al. qualifies as analogous art and can be relied upon in conjunction with the other cited references in the rejection.

Applicants further argue that Krzysik et al. do not teach fatty esters. In the last sentence of the full paragraph of column 5, fatty acid esters, which are synonymous with fatty esters, are taught as envisioned solidifying agents. As noted in the previous advisory action, the teaching is encompassed by lines 60-65 of this column. While there are options in addition to the fatty acid esters for the solidifying agent, as applicants note, there is no evidence that the selection of a fatty acid ester and specifically pentaerythritol tetrabehenate yields anything more than an expected outcome when included in the emulsion of Roulier et al. In both instances the fatty ester (fatty acid ester) is selected due to the temperature at which it melts in order to achieve the desired final product consistency.

Applicants further characterize Roulier et al. and Krzysik et al. as non-analogous art based upon portions of their titles. While it is true that Roulier et al. is concerned with w/o emulsions and Krzysik et al. teach absorbent articles, the latter teaches compositions that can be applied to cosmetic pads as well as absorbent articles for the purpose of caring for skin. In addition, Krzysik et al. envision their skin care composition in the form of an emulsion (see column 23 lines 32-35). The means employed for applying the skin care compositions (e.g. pad, absorbent article, finger, brush, etc.) does not change the nature of the composition. Since both references teach emulsion forms of compositions to care for the skin, they are analogous art. The rejection is not predicated on improper hindsight reconstruction, as applicants suggest, and is maintained.

Continuation of 13. Other: The amendment to the claims raise add new limitations that would require further search and consideration.